

Introduced by Committee on Environmental Quality (Senators Lowenthal (Chair), Campbell, Chesbro, Cox, Escutia, Figueroa, Kuehl, Runner, and Simitian)

February 22, 2005

An act to amend Sections 25395.84 and 25395.85 of, to add Sections 25395.79.3, 25395.79.4, 25395.79.5, and 25395.81.1 to, to add Article 7(commencing with Section 25395.102) and Article 8 (commencing with Section 25395.109) to Chapter 6.82 of Division 20 of, and to repeal Article 7 (commencing with Section 25395.105) of Chapter 6.82 of Division 20 of, the Health and Safety Code, relating to hazardous materials.

LEGISLATIVE COUNSEL'S DIGEST

SB 989, as introduced, Committee on Environmental Quality. Hazardous material: bona fide ground tenant: remedial actions.

Existing law, the California Land Reuse and Revitalization Act of 2004, provides that an innocent landowner, a bona fide purchaser, or a contiguous property owner, as defined, qualifies for immunity from liability from certain state laws for pollution conditions caused by a release or threatened release of a hazardous material, if the innocent purchaser, bona fide purchaser, or contiguous property owner meets specified conditions. The act also prohibits an agency from requiring an innocent landowner, bona fide purchaser, or contiguous property owner to take a response action under certain state laws. The act defines the term "agency" as the Department of Toxic Substances Control, the State Water Resources Control Board, or a California regional water quality control board.

The act requires a person who enters into an agreement with an agency for oversight of a site assessment to submit a site assessment plan to the agency and requires the agency, based upon a review of the

site assessment, to determine whether a response action is necessary to address any unreasonable risk from hazardous materials at the site. If the agency determines that a response action is necessary to prevent or eliminate an unreasonable risk, the bona fide purchaser, innocent landowner, or contiguous property owner is required to submit a response plan to the agency to conduct a response action at the site.

This bill would define the term “bona fide ground tenant,” and would provide that a certified bona fide ground tenant is not subject to liability under those state laws.

The bill would require a bona fide ground tenant who seeks to qualify for immunity from liability to enter into an agreement with an agency that includes the performance of a limited site assessment; and, if the agency determines that a limited response plan is necessary, the preparation and implementation of a limited response plan. The bill would require a person who wishes to be certified as a bona fide ground tenant to request an agency to issue a certification and would require the agency to provide this certification within 60 days after implementation of the limited response plan is completed, after making a specified determination.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 25395.79.3 is added to the Health and
- 2 Safety Code, to read:
- 3 25395.79.3. (a) “Bona fide ground tenant” means a person
- 4 who meets all of the following conditions:
- 5 (1) The person enters into a ground lease at an eligible site for
- 6 a term of 25 years or more.
- 7 (2) One of the following takes responsibility for site cleanup
- 8 pursuant to applicable law, and contractually agrees with the
- 9 person and with the department or regional board, that a
- 10 substantial amount of the rent received from the person, or other
- 11 assets or income streams acceptable to the department or a
- 12 regional board, will serve as security for, and will be paid into an
- 13 Internal Revenue Code Section 468B fund, or will otherwise be
- 14 dedicated or set aside for, the conduct of a response plan for site
- 15 cleanup pursuant to applicable law:
- 16 (A) The person's lessor.

1 (B) A redevelopment agency under the Polanco
2 Redevelopment Act (Article 12.5 (commencing with Section
3 33459) of Chapter 4 of Part 1 of Division 24).

4 (C) A city under the California Land Environmental
5 Restoration and Reuse Act (Chapter 6.10 (commencing with
6 Section 25401)).

7 (D) Any other person acceptable to the department or a
8 regional board.

9 (3) All releases of hazardous materials at the site occurred
10 before the person acquired the ground lease for the site, except
11 for a release of hazardous materials that is of a type, nature, or
12 amount that does not require reporting to a regulatory authority
13 pursuant to applicable law or other applicable statutory or
14 regulatory reporting requirements.

15 (4) The person did not cause or contribute to a release
16 specified in paragraph (3).

17 (5) The person completes a limited response plan approved by
18 the department or regional board that makes the property safe for
19 human occupancy based on its intended use.

20 (6) The person's proposed site development is either consistent
21 with a limited response plan approved by the department or
22 regional board pursuant to Article 7 (commencing with Section
23 25395.102), or the tenant agrees to pay for any incremental
24 limited response plan implementation costs that are incurred
25 primarily as a result of the tenant's site development or other
26 activities at the site.

27 (7) The person is not potentially liable, or affiliated with any
28 other person who is potentially liable, for the release at issue
29 through any of the following circumstances:

30 (A) A direct or indirect familial relationship.

31 (B) A contractual, corporate, or financial relationship, unless
32 the contractual, corporate, or financial relationship is created by
33 the instrument by which title or possession to the site is conveyed
34 or financed or a contract for the sale of goods or services.

35 (C) The result of a reorganization of a business entity that was
36 potentially liable for the hazardous substances at issue.

37 (b) For purposes of this section, "release" does not include
38 passive migration.

39 SEC. 2. Section 25395.79.4 is added to the Health and Safety
40 Code, to read:

1 25395.79.4. “Limited site assessment” means a site
2 assessment conducted pursuant to Section 25395.105 that has the
3 purpose of determining the cleanup, response, or removal action
4 that is required to be done, if any, to make a site safe for human
5 occupancy based on its intended use.

6 SEC. 3. Section 25395.79.5 is added to the Health and Safety
7 Code, to read:

8 25395.79.5. “Limited response plan” means a written plan
9 submitted to an agency pursuant to Section 25395.107 to conduct
10 those limited removal or remedial actions required to make the
11 site safe for human occupancy based on its intended use.

12 SEC. 4. Section 25395.81.1 is added to the Health and Safety
13 Code, to read:

14 25395.81.1. A person is not subject to liability under any
15 applicable law for a claim made by any person, other than an
16 agency, for response costs or other damages associated with a
17 release or threatened release of a hazardous material at the site
18 characterized in the limited site assessment conducted pursuant
19 to, or a limited response plan approved pursuant to, Article 7
20 (commencing with Section 25395.10), if the person is certified as
21 a bona fide ground tenant pursuant to that article.

22 SEC. 5. Section 25395.84 of the Health and Safety Code is
23 amended to read:

24 25395.84. (a) A court of competent jurisdiction may award
25 reasonable attorneys’ fees and experts’ fees to a person who
26 initiates a claim under an applicable ~~statute~~ *law* for contribution
27 for, or recovery of, response costs incurred for a response action,
28 or for any other response costs incurred at a site, if the person
29 meets all of the following criteria:

30 (1) The person is a bona fide purchaser, an innocent
31 landowner, ~~or~~ a contiguous property owner, *or a bona fide*
32 *ground tenant* and qualifies for immunity pursuant to this
33 chapter.

34 (2) The person is a prevailing party.

35 (3) On or before 20 calendar days prior to the date of the trial
36 on issues relating to the response costs at issue, the person serves
37 on the defendant both of the following:

38 (A) If a response plan has been approved for that site pursuant
39 to Article 6 (commencing with Section 25395.90) *or a limited*

1 *response plan pursuant to Article 7 (commencing with Section*
2 *25395.102), as applicable*, a copy of the approved response plan.

3 (B) A written demand for compensation setting forth the
4 specific sum demanded from the defendant, including a statement
5 of the reasoning supporting the demand. The amount of written
6 demand shall include all response costs sought from the
7 defendant at issue, including all interest, but shall not include
8 litigation expenses, attorneys' fees, and experts' fees. The
9 amount of the demand may include any alleged consequential
10 damages.

11 (b) In determining whether to award reasonable attorneys' fees
12 and experts' fees pursuant to this section, a court shall consider
13 the relationship of the amount of the written demand described in
14 subparagraph (B) of paragraph (3) of subdivision (a) to the total
15 sum of the response costs and, if appropriate and included in the
16 demand, the consequential damages in the written demand, to the
17 final determination of the costs and damages by the trier of fact.

18 (c) A court may award reasonable attorneys' fees and experts'
19 fees to an agency that is the prevailing party in an action arising
20 out of this chapter.

21 SEC. 6. Section 25395.85 of the Health and Safety Code is
22 amended to read:

23 25395.85. An innocent landowner, bona fide purchaser, ~~or~~
24 contiguous landowner, *or bona fide ground tenant* may seek
25 contribution from any person who is responsible for a discharge
26 or release of hazardous materials for which the innocent
27 landowner, bona fide purchaser, ~~or~~ contiguous landowner, *or*
28 *bona fide ground tenant* incurs agency oversight costs for the
29 review of a response plan *or a limited response plan* or oversight
30 of the implementation of a response plan *or a limited response*
31 *plan* subject to this chapter.

32 SEC. 7. Article 7 (commencing with Section 25395.105) of
33 Chapter 6.82 of Division 20 of the Health and Safety Code is
34 repealed.

35 SEC. 8. Article 7 (commencing with Section 25395.102) is
36 added to Chapter 6.82 of Division 20 of the Health and Safety
37 Code, to read:

Article 7. Bona Fide Ground Tenant Certification

25395.102. A person who wishes to be certified as a bona fide ground tenant may request the agency with which it entered into an agreement pursuant to Section 25395.105 to issue a certification pursuant to this section. The agency shall provide this certification within 60 days after implementation of the limited response plan is completed, but only if the agency does all of the following:

(a) (1) Determines that both of the following conditions have been met:

(A) The limited response plan is implemented at an eligible site.

(B) The limited response plan is completed under the direction of the agency.

(2) The agency shall issue the determination as specified in paragraph (1) in the following manner:

(A) Within 60 days after the date the agency approves a workplan for a limited response plan the agency acknowledges, in writing, that upon proper completion of the limited response plan, the person will be eligible for certification as a bona fide ground tenant.

(B) Within 30 days after the date when implementation of the limited response plan is commenced, the person notifies the department, the local health and building departments, and the regional board.

(C) Within 60 days after the date the implementation of the limited response plan is completed, the agency acknowledges in writing that the person is a certified bona fide ground tenant for purposes of this chapter.

(b) The agency certifies all of the following:

(1) The bona fide ground tenant is a party to a lease agreement with the owner or sublessor of the property.

(2) The bona fide ground tenant is obligated under the lease or sublease to make monthly lease payments that would constitute a reasonable fair market rental value for the property if the property was in a clean condition, discounted only for the expected costs of completing a limited site assessment, implementing a limited response plan, and any institutional

1 controls or other requirements imposed by this chapter, or
2 otherwise.

3 (3) The site is in compliance with the requirements of Section
4 101(40)(D), (E), (F), (G), and (H), inclusive, of the federal act
5 (42 U.S.C. Sec. 9601 (40)(D) to 9601 (40)(H), inclusive).

6 (4) The person requesting the certification under this section is
7 implementing the limited response plan in conjunction with, and
8 consistent with any, redevelopment or revitalization of the area in
9 which the site is located.

10 25395.103. An agency may withdraw a certification issued
11 pursuant to Section 25395.102 only if the agency that originally
12 issued that certification provides reasonable notice and
13 opportunity for the holder of the certification to take action to
14 prevent the withdrawal, and makes one the following findings:

15 (a) Material violations continue to exist for one or more of the
16 conditions, restrictions, or limitations imposed on the site as part
17 of the limited response action or certification.

18 (b) Site monitoring or operation and maintenance activities
19 that are required for the site as part of the limited response action
20 are not adequately funded or are not properly carried out.

21 (c) The person induced the agency to approve the completion
22 of the limited response action or issue the certification by fraud
23 or intentional nondisclosure or misrepresentation.

24 25395.104. A bona fide ground tenant that is certified
25 pursuant to this article may transfer the certification to a
26 subsequent bona fide ground tenant and that subsequent tenant
27 shall be subject to the rights and duties conferred by this article
28 upon a certified bona fide ground tenant.

29 25395.105. (a) A person that is a bona fide ground tenant
30 who seeks to qualify for the immunity provided by this chapter
31 shall enter into an agreement with an agency pursuant to this
32 section that includes the performance of a limited site
33 assessment, and, if the agency determines that a limited response
34 plan is necessary, the preparation and implementation of a
35 limited response plan.

36 (b) Before finalizing the agreement, the requested agency shall
37 notify other appropriate agencies, including the host jurisdiction.

38 (c) A person who enters into an agreement with an agency
39 pursuant to this section shall submit sufficient information to the
40 agency for the agency to determine whether the site is an eligible

1 site and whether the person meets the conditions to qualify as a
2 bona fide ground tenant pursuant to this chapter and prepare an
3 agreement pursuant to this section.

4 (d) (1) A person who enters into an agreement pursuant to this
5 section shall agree to take all actions necessary to make the site
6 safe for human occupancy based on its intended use. These
7 actions may include actions necessary to prevent an imminent
8 and substantial endangerment before the approval of a limited
9 response plan.

10 (2) In determining whether the limited response plan will
11 make the site safe for its intended use for purposes of this
12 subdivision, the agency shall take into account the intended use
13 of the property, in accordance with any changed use of the
14 property.

15 25395.106. (a) (1) A person who enters into an agreement
16 with an agency pursuant to Section 25395.105 for the oversight
17 of a limited site assessment shall submit a limited site assessment
18 plan to the agency to conduct a limited site assessment of the site
19 in accordance with the requirements of this section.

20 (2) If the agency requires a health risk assessment as part of
21 that agreement, the health risk assessment shall be prepared in
22 accordance with subdivisions (b), (c), and (d) of Section
23 25356.1.5.

24 (b) The limited site assessment plan shall include all the
25 following:

26 (1) Adequate characterization of the hazardous materials at the
27 site for the purposes of ensuring that the site is safe for any
28 intended development or use.

29 (2) Reasonably available information about the site, including
30 where appropriate, a risk assessment that evaluates the risk posed
31 by any hazardous materials released or threatened to be released
32 at, or from, the site, and information regarding reasonably
33 anticipated foreseeable uses of the site based on current and
34 projected land use and zoning designations.

35 (c) A person shall submit the limited site assessment plan to
36 the agency for review and approval.

37 (d) The agency shall evaluate the adequacy of the limited site
38 assessment plan to ensure it contains all necessary information.

39 (e) After evaluating the limited site assessment plan, if the
40 agency finds that the limited site assessment is adequate to

1 address the intended uses or development of the site the agency
2 shall approve the limited site assessment and provide notification
3 to appropriate persons.

4 25395.107. (a) After implementing the limited site
5 assessment plan, the person shall submit a report of the findings
6 made pursuant to the plan to the agency. Based upon a review of
7 this information, the agency shall determine whether a limited
8 response plan is required to be developed to ensure that the site is
9 safe for human occupancy based on its intended use.

10 (b) If upon review of the limited site assessment prepared
11 pursuant to this article, the agency determines that a limited
12 response plan is necessary to ensure that the site is safe for its
13 intended use, the bona fide ground tenant shall submit a limited
14 response plan to the agency to conduct a limited response action
15 at the site, in conformance with the agreement entered into
16 pursuant to Section 25395.105. The agency shall not require the
17 limited response plan to address the remediation of deep soil or
18 groundwater contamination, unless the agency determines this
19 remediation is necessary to make the site safe for the intended
20 human use. The limited response plan shall include all of the
21 following:

22 (1) An opportunity for the public, other agencies, and the host
23 jurisdiction to participate in decisions regarding the limited
24 response plan, taking into consideration the nature of the
25 community interest.

26 (A) The methods for public participation proposed in the
27 response plan shall include a public notice and opportunity for
28 public review and comment, and may include, but are not limited
29 to, the use of factsheets, public notices, direct notification of
30 interested parties, public meetings, and an opportunity to
31 comment on the proposed response plan prior to agency
32 approval.

33 (B) To the extent possible, the agency shall coordinate its
34 public participation activities with those undertaken by the host
35 jurisdiction and other agencies associated with the development
36 of the property, to avoid duplication to the extent feasible.

37 (2) Identification of the release or threatened release that is the
38 subject of the limited response plan and documentation that the
39 limited response plan is based on an adequate characterization of
40 the site.

(3) An identification of the limited response plan objectives and the proposed remedy, and an identification of the reasonably anticipated future land uses of the site and of the current and projected land use and zoning designations. This identification shall include confirmation by the host jurisdiction that the anticipated future land uses and current and projected land uses and zoning designations are accurate.

(4) A description of activities that will be implemented to control all endangerment that may occur during the limited response action at the site.

(5) A description of all land use controls that are part of the response action.

(6) A description of wastes other than hazardous materials at the site and how that waste will be managed in conjunction with the response action.

(7) Provisions for the removal of containment or storage vessels and other sources of contamination, including soils and free product, that cause an imminent or substantial endangerment.

(8) Provisions for the agency to require further response actions based on the discovery of hazardous materials that pose an unreasonable risk to human health and safety or the environment that are discovered during the course of the limited response action or subsequent development of the site.

(9) Any other information that the agency reasonably determines is necessary.

(c) The agency shall evaluate the adequacy of the limited response plan submitted pursuant to subdivision (b) and shall approve the plan if the agency makes all of the following findings:

(1) The plan contains the information required by subdivision (b).

(2) When implemented, the plan will place the site in a condition that allows it to be used for its reasonably anticipated future land use without substantial risk to the human health and safety of the anticipated occupants of the site.

(3) The plan addresses all public comments.

(4) If applicable, the plan provides for applicable land use and engineering control that are part of the remedy contained in the limited response plan.

1 (d) Upon approval of the limited response plan by the agency,
2 the agency shall notify all appropriate persons, including the host
3 jurisdiction.

4 (e) If the use of the property changes, after a limited response
5 plan is approved, to a use that requires a higher level of
6 protection, the agency may require the preparation and
7 implementation of a new limited response plan pursuant to this
8 article.

9 25395.108. A person, who acquires a property from a bona
10 fide ground tenant that was previously issued a certificate of
11 completion for a limited response plan required by this article,
12 may qualify as a bona fide ground tenant by demonstrating to the
13 agency that the person meets the bona fide ground tenant
14 eligibility requirements of this chapter.

15 SEC. 9. Article 8 (commencing with Section 25395.109) is
16 added to Chapter 6.82 of Division 20 of the Health and Safety
17 Code, to read:

18
19 Article 8. Repeal
20

21 25395.109. This chapter shall remain in effect only until
22 January 1, 2010, and as of that date is repealed, unless a later
23 enacted statute, that is enacted before January 1, 2010, deletes or
24 extends that date.